United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7128

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- x

JUAN SANCHEZ LUGO,

Plaintiff-Appellant,

-against-

THE EMPLOYEES RETIREMENT FUND OF THE ILLUMINATION PRODUCTS INDUSTRY, CHARLES F. ROTH, individually and in his capacity as Assistant Executive Secretary of the Employees Retirement Fund of the Illumination Products Industry, and KENNETH CEPPOS, SIMON GRAFSTEIN, LEONARD GOLUB, HANNIBAL IMBRO, JOHN H. KLIEGL II, EDWARD R. MURPHY, JERRY SCHNEIT, ROWLAND J. SIMES, MEYER TEITELBAUM, WALTER WEISS, ALBERT BAUER, SOL BERMAN, JOSEPH BONO, STEPHEN KANYOOSKY, KAREL MRNKA, JOHN SCIACCA, LOUIS STEIN, THOMAS VAN ARSDALE, HARRY VAN ARSDALE, JR., and SANTOS ZAPPATA, as trustees of the Employees Retirement Fund of the Illumination Products Industry,

Defendant-Appellees.

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B P/S

APPELLANT'S BRIEF

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STATUTES INVOLVED

Taft-Hartley Act §302, 29 U.S.C. §186:

> Restrictions on payments and loans to employee representatives, labor organizations, officers and employees of labor organizations, and to employees or groups or committees of employees:
>
> (c) The provisions of this section shall not be applicable...
>
> (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection

by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities

(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of Title 28 (relating to notice to opposite party), to restrain violations of this section, without regard to the provisions of section 17 of Title 15 and section 52 of this title, and the provisions of sections 101-115 of this title.

QUESTIONS PRESENTED

I. DID THE DISTRICT COURT ERR IN HOLDING THAT THE PROCEDURES USED BY THE DEFENDANT RETIREMENT FUND FOR THE DETERMINATION OF CLAIMS FOR DISABILITY PENSIONS DID NOT VIOLATE THE TAFT-HARTLEY ACT?

II. DID THE DISTRICT COURT COMMIT REVERSIBLE ERROR IN EXCLUDING AT TRIAL PLAINTIFF'S EVIDENCE WITH RESPECT TO HIS CLAIM ON THE 90/10 RULE?

III. ON THE BASIS OF THE EVIDENCE BEFORE IT, DID THE DISTRICT COURT ERR IN RULING THAT THE 90/10 RULE IS VALID UNDER §302(c)(5) OF THE TAFT-HARTLEY ACT?

STATEMENT OF THE CASE

Appellant (hereinafter plaintiff) filed the complaint (A-4)* in this action on May 11, 1973 in the United States District Court for the Eastern District of New York, alleging violations by appellees (hereinafter defendants)** of §302(c)(5) of the Taft-Hartley Act, 29 U.S.C. §186(c)(5). The case was, at that time, assigned to the Hon. John R. Bartels, U.S.D.J., for all purposes. The complaint presented two basic claims for adjudication: (1) that the procedure used by the defendants retirement fund and trustees to determine eligibility for disability pensions violates §302(c)(5) of the Taft-Hartley Act in that it fails to afford a claimant for such a pension a hearing which incorporates the minimum requirements of due process and therefore does not permit the pension plan to operate for "the sole and exclusive benefit of the employees" as required by said section; and (2) that the requirement that applicants for retirement pensions must have worked 90 months within the 10 years immediately preceding application (the 90/10 Rule) for such pensions arbitrarily and unreasonably excludes employees from the benefits of the pension fund, and is thus also violative of the "sole and exclusive benefit" requirement of §302(c)(5)

*All such references throughout this brief are to the joint appendix filed by the Appellant in this matter.

**The defendant Employes Retirement Fund is a Taft-Hartley Act pension plan and as such is required to comform to the requirements of §302(c)(5) of that Act, 29 U.S.C. §186(c)(5). The remaining defendants are the Assistant Executive Secretary of the Fund and its trustees, an equal number of which are appointed by the employers and the union as required by §302(c)(5).

of the Taft-Hartley Act. Plaintiff sought declaratory and injunctive relief to establish plaintiff's rights under the Act.

Defendants moved to dismiss the complaint pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure, on the grounds that the Court had no jurisdiction over the claims, and that the plaintiff had failed to state a claim upon which relief could be granted, and, pursuant to Rule 12(b)(6) and 56, F.R.C.P., for summary judgment. The District Court per Bartels, J., denied defendant's motion in all respects on October 11, 1973. 366 F. Supp. 99 (E.D.N.Y. 1973)(A-15).

Defendants then submitted their answer (A-20) in October, 1973, denying plaintiff's claims. After discovery, cross-motions for summary judgment were heard by Judge Bartels in June, 1974, and denied from the bench without written opinion.

A trial of the issues as set forth in a pre-trial order (A-198) was held on October 21, 1974. At trial, Judge Bartels, for the first time in the course of the proceedings, raised the question of the ripeness of plaintiff's attack on the 90/10 Rule and, thus, refused to permit plaintiff to present evidence or conduct cross-examination with respect to this claim (A-256, 257, 241, 374-376, 381-382, 386-392). Nonetheless, in his decision of January 17, 1975 (n.o.r.) (A-411) in which he dismissed the complaint, Judge Bartels

decided the merits of both of plaintiff's claims. As to the first claim, Judge Bartels held that the written requirement of the pension plan that the trustees act in good faith adequately protects applicants from disloyalty of the officials, and thus the failure to provide for a hearing is not a structural defect in the plan (A-405-406). Judge Bartels read the plaintiff's second claim as a challenge to the non-vesting feature of the 90/10 Rule. In so doing, he held that the Rule was not arbitrary or unreasonable, but was designed to protect the actuarial soundness of the Fund (A-407).

A notice of appeal to this Court was filed on February 14, 1975 (A-413).

STATEMENT OF FACTS

Prior to terminating employment in 1972 at the age of 52, plaintiff had, for the previous 16-1/4 years been both an employee in the Illumination Products Industry and a member of the International Brotherhood of Electrical Workers Union, Local #3 (A-199). As such, plaintiff was a participant in the defendant Employees Retirement Fund (Id.) and had accumulated 195 months of covered employment towards a pension under the terms of said fund (A-201).

Plaintiff left the industry in 1972 because his diabetic condition and a related visual impairment made it impossible for him to continue his work (A-277-278). He has not worked since leaving the industry (A-272).

Plaintiff applied to the defendant Fund for a disability pension on April 14, 1972 (A-18?). The retirement committee of the Fund, in accord with its regulations, secured a medical report from the Plan's physician to whom plaintiff had been sent. The defendant board of directors met in regular session and considered plaintiff's application on September 27, 1972. No written notice of this meeting was ever given to plaintiff. Plaintiff was not present at the meeting, was not invited to testify, call witnesses or present other evidence on his own behalf. Nor was plaintiff able to cross-examine adverse witnesses or reply to other evidence offered against his claim (A-202, ¶9(b)).

At said session, plaintiff's earnings record, the report of the committee-appointed physician (A-43,¶20(c), A-197), and two letters from plaintiff's physician (A-188 189) were read to the board members. Plaintiff's earnings records indicated that he had met all the non-health related criteria for a disability pension. However, the physician recommended that plaintiff be found not disabled (A-197). Plaintiff's application was thus denied. The only written material comprising the record upon which this decision was based consisted of the physician's report (Id.) and medical history (A-190) and two brief notes from plaintiff's physician (A-188, 189). The sole written statement enunciating this decision was: "Denied - Not eligible." (A-202). There were no written findings of conclusions.

Pursuant to the collective bargaining agreement which sets forth the retirement plan (A-26), the determination of disability applications is in the sole discretion of the retirement committee. The determination is final and not subject to appeal or review (A-27).

The conditions for eligibility for the standard (retirement) pension require that plaintiff:

(1) meet the eligibility requirements in effect when he became a participant in the Plan;

(2) attain the age of 60*; and

(3) have been employed or have been available for employment with covered employers for an aggregate of 90

*Due to an error in transcription, the trial transcript (A-211-395) repeatedly states that the age is 66.

months within the ten years immediately preceding application (A-133). Since plaintiff's participation in the retirement fund has ceased, only upon again becoming employed by a contributing employer and meeting the eligibility requirements in effect at that time for new participants could he become eligible for a standard pension. The present eligibility requirement is twenty years' service (Id.).

Plaintiff more than meets the 10-year service requirement now governing his application. He cannot satisfy the third requirement as long as his illness continues. If his illness ceases, he will be able to become a participant only under the newer, more stringent service requirements.

JURISDICTION

The District Court based federal jurisdiction over plaintiff's claims on the grounds that they set forth alleged defects in the defendant retirement fund which, if proved, would constitute structural violations of §302(c)(5) of the Taft-Hartley Act, 29 U.S.C. §186(c)(5). Lugo v. Employees Retirement Fund, 366 F. Supp. 99 (E.D.N.Y., 1973)(A-15). Jurisdiction was therefore found under §302(e) of the Taft-Hartley Act, 29 U.S.C. §186(e).

ARGUMENT

POINT I

THE DISTRICT COURT ERRED IN HOLDING THAT THE PROCEDURES USED BY THE DEFENDANT RETIREMENT FUND FOR THE DETERMINATION OF CLAIMS FOR DISABILITY PENSIONS DID NOT VIOLATE THE TAFT-HARTLEY ACT.

Under §302(c)(5) of the Taft-Hartley Act, 29 U.S.C, §186(c)(5), pension plans established pursuant to the section must be operated for "the sole and exclusive benefit of the employees." The primary purpose of Taft-Hartley pension plans is to provide benefits to employees whose labor has contributed to the growth of the fund. Pete v. U.M.W., ____ F.2d ____ (D.C. Cir., 1975), Docket No. 73-1270, 2/12/75; 29 B.N.A. Pension Rptr. D-1, 2/25/75. Under the "sole and exclusive benefit" requirement, a pension plan may not exclude employee participants arbitrarily or unreasonably. Roark v. Lewis, 401 F.2d 425 (D.C. Cir., 1969).

Logically, the same provision also requires that pension plans adopt reasonable procedures for evaluating claims for benefits in order to avoid arbitrary results. The standard of law to be applied is meticulously set out by the District of Columbia Court of Appeals in Sturgill v. Lewis, 372 F.2d 400, 401 (D.C. Cir. 1966), quoted by Judge Bartels in his first opinion (A-19):

> Since the Trustees [of a Taft-Hartley Act Pension Fund] perform their functions as such pursuant to an Act of Congress in an area

of social concern and importance,

* * *

> the proceedings before the Trustees should conform to at least elemental requirements of fairness, which requirements in these circumstances normally include, in addition to notice, a hearing at which the applicant is confronted by the evidence against him, an opportunity to present evidence in his own behalf, articulated findings and conclusions having a substantial basis in the evidence as a whole, and a reviewable record. (emphasis added)

The collective bargaining agreement under which the defendant retirement fund is established expressly provides that:

> The Committee's action in approving or disapproving any application shall be final. A rejected applicant shall have no right or claim of any kind against the Committee, the Union, or the Employers. (A-42, ¶20(a), see also A-201, ¶6).

The standard for eligibility for a disability pension requires that an applicant have worked 90 months out of the 10 years immediately preceding the filing of an application and be disabled to the extent that he is unable to work in the industry or in any other job (A-133). Plaintiff suffers from diabetes and a related visual ailment (A-277-278). His work in the Illumination Products Industry as a metal cutter required precision (A-275-277) and involved the risk of harm to plaintiff or others (A-277, A-279-280) in the event of

dizziness or inability to focus on the work (A-279-281). Plaintiff felt that he could no longer safely perform his job (A-277), and applied for disability benefits on April 14, 1972 (A-182). The board did not meet on plaintiff's claim until September 17, 1972. At that session, following its practice and regulations, the board considered only the written report of the committee-appointed physician (A-43, ¶20(c), A-197) who is in the employ of the defendants (A-370-371); two letters from plaintiff's private physician (A-188, 189); and plaintiff's earnings history. These reports were read to the board (A-202, ¶9(c), A-376, 377). Plaintiff was not given notice of the meeting. No witnesses were present to be questioned by the board as to the basis or meaning of the medical findings. Plaintiff was not present and did not have the opportunity to review the medical report of the committee-appointed physician, cross-examine witnesses, or present rebuttal witnesses. Nor could plaintiff testify as to his condition. No vocational expert testified as to plaintiff's qualifications for employment on other industries (A-202, ¶9(b)). The record of the board's decision consists of the following notation: "Denied - Not eligible." (A-202). The basis of that decision is not recorded and, according to the provisions of the plan as set forth above, plaintiff has no right to appeal. The defendants admitted at trial that none of the persons who made the decision denying plaintiff disability benefits was a medical expert (A-377). Thus, the procedure used by

defendants for determining disability pension claims simply does not meet any of the specific procedural standards set forth in Sturgill, supra, at 401.*

On consideration of this issue after trial, the District Court determined that:

> [t]he absence of a provision for a hearing on plaintiff's application for disability benefits does not consititute a structural defect converting the Fund into one not "for the sole and exclusive benefit of the employees." In this respect the employees are protected from possible disloyalty of the officials administering the Fund by the "good faith" requirement of Paragraph 5 of the Agreement (A-27) which requires the committee to make a bona fide determination of disability and to administer the Fund for the sole and exclusive benefit of the employees. (Appendix citation added) (A-405-406).

This decision not only fails to require the defendant retirement fund to adhere to any reasonable procedural standards whatsoever, but it also flies in the face of the District Court's own earlier opinion where, in citing the detailed procedural standards required by Sturgill, the Court states:

> a trust fund which authorizes the trustees to act arbitrarily and capriciously to exclude potential employee-beneficiaries has a structural defect in that it fails to satisfy the requirement that the fund shall be for the sole and exclusive benefit of the employees. (A-19)

*Perhaps as a result, the number of disability pensions granted under the plan has been minimal: during all of 1970, only two disability pensions were awarded, none to a worker under 55 years of age (A-100). As of April 30, 1970, only 50 persons were receiving disability pensions and of those, 35 were 55 years of age or older (A-101).

While the defendant retirement fund requires the defendant trustees to act in good faith,* it is apparent that contrary to the holding of the District Court, this requirement is insufficient to ensure that the defendant retirement fund be for the sole and exclusive benefit of the employees. Good faith on the part of the trustees merely requires that they fulfill their duties under the pension plan as written and not act unreasonably. If the defendant retirement fund as written is structurally violative of the Taft-Hartley Act because it fails to incorporate fair procedures for the determination of claims,** the good faith requirement that the trustees simply carry out the duties imposed upon them by the defendant retirement fund does not cure this defect.

In Sturgill v. Lewis, supra, the District of Columbia Court of Appeals remanded a matter to the trustees of the defendant plan in that case to determine the issues upon which the D.C. District Court had, in error, conducted a de novo hearing with respect to the plaintiff's claim for a pension. In a decision precisely relevant to the case at bar, the Court set forth the procedural standards*** to which the

*The good faith provision of Paragraph 5 of the collective bargaining agreement (A-27) affords no additional protection to the employees since it merely requires the trustees to fulfill a duty which is imposed upon them both by the Taft-Hartley Act and by common law.

**The provision of the defendant retirement fund which seeks to insulate the trustees' decisions from review is further evidence of the deficiency of the structure of the fund (A-42 ¶20(a)).

***These standards are fully set forth earlier in this Point.

proceedings before the trustees were to conform in order to ensure "elemental requirements of fairness." at 401. The Court found fairness requirements necessary in such proceedings because the trustees "perform their function pursuant to an Act of Congress (the Taft-Hartley Act) in an area of social concern and importance..." at 401. This decision has its roots in the unique nature of Taft-Hartley pension plans. As recognized by the District Court in the case at bar, "[a] Section 302 trust fund does not fit the categories of an ordinary trust and to that extent is sui generis and thus requires compliance with the objectives of Section 302." (A-19). As stated by Sturgill, Congress evidenced a strong social concern in the enactment of §302. The power of federal courts to insure that these Congressional objectives are met exists within a "penumbra of express statutory mandate." (A-19).

The standards of fundamental fairness required in Sturgill are a part of the federal common law developed under Section 302(e) of the Taft-Hartley Act pursuant to the principle of Lewis v. Benedict Coal, 361 U.S. 459 (1960), and Textile Workers v. Lincoln Mills of Alabama, 353 U.S. 448 (1957). In developing federal common law standards of fundamental fairness, the obvious and appropriate sources of law are the due process clauses of the fifth and fourteenth amendments of the United States Constitution. Without incorporating into Section 302 the specific requirements of either amendment, the policies underlying the amendments should nevertheless be

a prime consideration. See generally Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951); Goldberg v. Kelly, 397 U.S. 254 (1970).

In all its aspects the decision-making process of the defendant retirement fund violates not only the standard set forth in Sturgill, but in addition it violates any conceivable standard of fair decision making, whatever its source. Surely the Congressional objectives inherent in Section 302 are in no way met by a fund such as the defendant retirement fund which permits its trustees to decide claims based on insubstantial evidence, and with untrammeled power and arbitrary discretion.

POINT II

THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN EXCLUDING AT TRIAL PLAINTIFF'S EVIDENCE WITH RESPECT TO HIS CLAIM ON THE 90/10 RULE.

After trial, the district court also decided plaintiff's second claim for relief (A-206-207), dealing with his eligibility for a standard (retirement) pension. While plaintiff had fulfilled all other requirements for this pension (A-133), he had not and could not meet the requirement of the retirement fund that he work or be available for work with covered employers for an aggregate of 90 months within the 10 years immediately preceding his application for retirement benefits at age 60 (Id.)--the 90/10 rule. Plaintiff asserted that this requirement violates §302(c)(5) of the Taft-Hartley Act in that it precludes the fund from operating for "the sole and exclusive benefit of the employees."

At trial the district court raised for the first time the issue of whether evidence would be heard with respect to plaintiff's 90/10 rule claim (A-249-253). The district court then refused to permit plaintiff to introduce evidence on this claim. Specifically, the court refused to permit any cross-examination of defendant Roth with respect to this claim (A-381-392), and refused to allow the introduction of an actuarial valuation (A-81) of the defendant retirement fund (A-256-260, A-374, A-384).

The district court's exclusion at trial of plaintiff's

evidence on his 90/10 rule claim was inconsistent with the court's dismissal of this claim on the merits after trial (A-402). While plaintiff agrees with the court's final view that his second claim should have been considered on the merits, the court's change of position foreclosed plaintiff from proving his case at trial. Rather than reaching its decision in this way, the court should have held a trial on the issue of the validity of the 90/10 rule. Since the court in fact determined the merits of this claim without affording plaintiff the opportunity to prove his case, the court denied plaintiff due process of law and committed reversible error.

Rule 61 of the Federal Rules of Civil Procedure provides that an error in the admission or exclusion of evidence, if not a mere technicality, is ground for reversal of judgment unless it is clear that the error did not affect the judgment. Wright & Miller, Federal Practice and Procedure, §2883. If the error is such that its natural effect is to prejudice the litigant's substantial rights, the burden of sustaining the verdict is on the appellee. Kotteakos v. United States, 328 U.S. 750, 760 (1946).

In this case, as set forth above, the district court refused to permit plaintiff to cross-examine defendant Roth with respect to the 90/10 rule claim, and also refused to introduce into evidence an actuarial valuation of the financial position of the defendant retirement fund. Each denial constitutes prejudicial error to plaintiff.

To establish his second claim, plaintiff had to show that there was no rational nexus between the 90/10 rule and any legitimate policy of the plan which was consistent with Section 302(c)(5) of the Taft-Hartley Act (A-18). Defendant Roth had testified that one reason for the promulgation of the 90/10 rule had been to maintain the actuarial soundness of the pension plan (A-279). On cross-examination, plaintiff attempted to refute this allegation by showing that the witness' contention was inconsistent with the facts (see Point III, infra).

The ruling of the court that plaintiff could not cross-examine defendant Roth in any regard to the 90/10 rule thus deprived plaintiff the opportunity to prove an essential element of his claim--that the 90/10 rule is not necessary to preserve the fiscal integrity of the plan.

Plaintiff had planned to use in cross-examination two annual reports (already in evidence) of the defendant retirement fund (A-50, 66). Further, in connection with the annual reports, plaintiff twice attempted to introduce into evidence an actuarial valuation (A-81) of the defendant retirement fund for the purpose of proving that defendent Roth's assertion that the 90/10 rule was necessary to preserve the fund's fiscal integrity was incorrect. The district court refused to enter this document into evidence on both occasions (A-256-260, 384).

Plaintiff's inability to cross-examine and introduce these documents becomes highly significant in light of the

district court's decision that the 90/10 rule is necessary to maintain the actuarial soundness of the defendant retirement fund (A-402). The court's probable use of the actuarial valuation in reaching this decision despite its refusal to place it in evidence at trial, substantially prejudiced plaintiff's rights in not being able to attempt to use these documents and receive clarification of them upon cross-examination of defendant Roth. Rather, the District Court relied on these documents in vacuo with merely defendant Roth's bald assertion as to the relevance of their contents as support for the 90/10 rule.

As such, the district court's error in refusing to permit plaintiff to present evidence at trial on his 90/10 rule claim was prejudicial to plaintiff's rights, and, as such, constitutes reversible error.

POINT III

ON THE BASIS OF THE EVIDENCE BEFORE IT, THE DISTRICT COURT ERRED IN RULING THAT THE 90/10 RULE IS VALID UNDER §302(c)(5) OF THE TAFT-HARTLEY ACT.

The defendant retirement fund provides a flat benefit amount to all workers who qualify for a pension regardless of years of service. To qualify for a retirement pension under the defendant's pension plan, a worker must meet three requirements:

1. He must be at least age 60 at the time of application;

2. He must have met the service requirement in effect when he became a participant in the plan;

3. He must have at least 90 months of covered service within the 10 years immediately preceding the filing of the application (the 90/10 Rule).

These eligibility requirements result in a plan which is structured in such a way that the defendant retirement fund arbitrarily excludes plan participants to such an extent that it is no longer "for the sole and exclusive benefit of the employees" of the employers, as required by the Taft-Hartley Act, §302(c)(5), 29 U.S.C. §186(c)(5). Two tests for ascertaining whether or not an eligibility requirement is overly exclusionary have evolved:

(1) If the eligibility requirement disqualifies participants with long periods of service in the industry

while including persons with much shorter periods of service, it is overly exclusionary. See, e.g., Roark v. Lewis, 401 F.2d at 429.

(2) If the eligibility requirement takes away benefits already earned because of some occurrence beyond the control of the worker, it is overly exclusionary. See, e.g., Lee v. Nesbitt, 453 F.2d 1309 (9th Cir., 1971). If an eligiblity requirement is shown to be overly exclusionary under either of these tests, it is hence unlawfully discriminatory absent a strong showing by the trustees of a valid reason for its existence. Roark v. Lewis, supra.

The District Court recognized the first test, formulated in Roark v. Lewis, 401 F.2d 425, 429 (D.C. Cir. 1968) and followed in Insley v. Joyce, 330 F. Supp. 1228, 1230 (N.D. Ill., 1971), in its opinion upholding federal jurisdiction over this case (A-18). In this case, the 90/10 Rule has the effect of ignoring a sizeable portion of a worker's career in determining service credits. An average working career for persons retiring now may have lasted 45 or 50 years. Yet a worker with substantial service in the industry in question is often parsed over for a pension for failing to meet the 90/10 Rule, while other with substantially less service qualify. For instance, a worker may have accumulated more than 30 years of covered employment in the industry and may still fail to meet the requirements of the 90/10 Rule, and thus not receive a pension. Another individual to whom

these requirements applied could have commenced work at age 50 years, worked until age 60, and received a pension. Periods of employment accrued prior to age 50 are simply of no importance under the plan. The defendant retirement fund clearly excludes workers with substantial periods of service while including those with much shorter periods of service. See also Roark v. Boyle, 439 F.2d 497 (D.C. Cir., 1970).

In fashioning the second test set forth above, the Court of Appeals for the 9th Circuit in Lee v. Nesbitt, supra, found that a break-in-service rule*, while reasonable insofar as its purpose was to assure sufficient contributory service, was nonetheless invalid as applied to the plaintiff. The reasoning of the Court was based on the fact that while plaintiff satisfied the minimum service requirements for a pension, his interruption in employment had been involuntary. The Court stated that a rule which deprives an individual of benefits due to an occurrence beyond his control, despite the fact that he had met all other requirements, was unreasonable. See also, LaVella v. Boyle, 444 F.2d 910 (D.C. Cir., 1971).

The 90/10 Rule at issue here works on identical hardship. Plaintiff, like Lee, has fulfilled the minimum service requirements for a pension but, due to circumstances beyond his control, his physical condition, is unable to

*Most plans, including the defendant, have rules which cancel a worker's prior employment for the purposes of pension eligibility if the worker has an absence from the industry for a specific period of time, generally two years.

continue working and therefore satisfy the 90/10 rule.

The rule is especially unreasonable under the second test because to qualify for a disability pension under the defendant retirement fund, an individual must not be able to engage in any employment activity (A-133). Thus, if a worker were disabled to the extent that he could not work in the industry but could work in other employment, then regardless of his years of service, he would not satisfy the requirements for either a disability pension or for retirement benefits and would effectively be foreclosed from ever receiving a pension. The 90/10 rule clearly takes away benefits already earned due to circumstances beyond the control of the worker.

Once it has been shown that a Taft-Hartley pension plan requirement is overly exclusionary under either of these tests, "the burden is on the trustees to show some rational nexus between the Fund's purpose (to be for the sole and exclusive benefit of the employees) and the requirement." Roark v. Lewis, supra, at 429 (parenthetical phrase added). The District Court in this case adopted the language in Roark, verbatim in its decision determining federal jurisdiction (A-18).

During the entire course of the proceedings below, defendants offered two justifications for the promulgation of the 90/10 rule. The first, offered by defendants in support of their motion for summary judgment (A-25) and

reiterated at trial (A-380-381), was that the rule was necessary to induce experienced employees to remain in the industry. While it is clear that retaining experienced employees in the industry is extremely advantageous to employers, employees are afforded no benefit whatsoever from a requirement which ties them to the industry under threat of loss of pension benefits.

Further since employees must at least remain "avaialbe for employment" pursuant to the 90/10 rule, the union is assured of a continuous source of revenue from membership dues paid by employees attempting to meet this requirement. Once again, no benefit, but, rather, a hardship is worked upon the employees by the 90/10 rule.

Clearly, the alleged justification that the 90/10 rule is necessary to retain experienced employees in the industry is an impermissible basis for its existence. "If the purposes and effects behind this provision are thus primarily to benefit the union and penalize employees, we clearly are presented with a trust fund that possesses the structural deficiency of not being solely for the benefit of employees." Insley v. Joyce, 330 F. Supp. 1228, 1234 (N.D. Ill., 1971).

The second alleged justification for the 90/10 rule was advanced by defendant Roth during cross-examination by plaintiff's attorney: the 90/10 rule is necessary to maintain the fiscal integrity of the plan (A-379-380). But

any exclusionary rule, whether it is the 90/10 rule, a signatory last employer rule (cf. Roark v. Lewis, supra), a break-in-service rule (cf. Lee v. Nesbitt, supra), or something patently discriminatory such as refusing pensions on the basis of race or sex, will save a plan money. In addition to showing necessity to save money, the plan must prove that its exclusionary rule is a legitimate means of doing so. In Roark v. Boyle, 439 F.2d 497 (D.C. Cir., 1970), the Court rejected the plan's assertion that a last signatory employer rule was necessary to maintain fiscal integrity. The Court noted that eligibility requirements which are geared to the entire contributory history of the employee as opposed to those contributions made only for an employee's last few years of service, would more fully comport with the purposes of Section 302 at 503. Defendant's 90/10 rule should fall for the same reason.

Further, in the case at bar, the defendants made no attempt other than the mere assertion itself, to substantiate their claim that the 90/10 rule existed in order to maintain the actuarial soundness of the fund. Surely, more of a showing than this would be necessary for the defendants to overcome their burden of establishing a rational nexus between the 90/10 rule and a permissible plan purpose.

It is doubtful that the defendants could, in fact, have established such a nexus. The documents before the court: the actuarial valuation (A-81); and the two annual reports (A-50 and 66) indicate that the defendant retirement fund's

fiscal integrity, contrary to the opinion of the District Court (A-402), is in no danger and would not suffer in the slightest should the 90/10 rule be eliminated.

The last actuarial valuation and review done for the defendant retirement fund was based on the fund's financial position up through April 30, 1970, the end of its fiscal year. That report establishes that in the prior five years since the previous valuation was done, the average age of an active employee dropped from 42-1/2 years to 40-1/2 years and the average length of service for active employees dropped from 12-1/2 years to 9 years (A-85). Both these declines were favorable to the fund (Id.). The valuation goes on to report that while it had been assumed that the defendant retirement fund would require a contribution by employers (mandated by collective bargaining agreement) of $156 per active employee in order to meet expenses, due to a change in assumptions because of an underestimation in the turnover rate, the actual required contribution was only $128 per active employee (A-108-109). The fund, at that time, was receiving contributions at the rate of $197 per active employee (A-94).

This constitutes a 54% difference between the necessary level of contribution and what was actually received.

The fund could conceivably maintain that these contributions in excess of the minimum were necessary to amortize the future liability which the fund will incur when present

participants become eligible for benefits. The actuarial valuation provides some support for this in that on April 30, 1970 the fund's assets were approximately 8 million dollars while its future liability was 11.8 million dollars (A-99) and its assets were increasing at the rate of $500,000 per year (Id). However, the actuaries did not take into account a new collective bargaining agreement which was signed in September, 1970 (A-26) and which not only apparently raised the percentage rate for calculating employer contributions, but made the raise retroactive to July 1, 1956 (A-28-29) for all signatory employees. This no doubt explains why the defendant retirement fund had assets in excess of 12 million dollars on April 30, 1971 (A-69) when it had had only 8 million dollars exactly one year earlier (A-94). It will also explain why the plan had assets of $13,153,241 on April 30, 1972 (A-69) and $14,266,658 on April 30, 1973 (A-52) and thus was increasing at the rate of over one million dollars per year instead of the earlier rate of $500,000 per year.* The $14,266,658 figure is considerably larger than the $11 million figure which the actuaries had stated was necessary to cover future liabilities.

The defendant retirement fund's 90/10 rule is thus not structured in a way which fairly meets the needs of its participants. In an industry with relatively high turnover,

*The rate of annual growth may not be attributed to any great stroke of luck in investments such as a bullish stock market. The defendant retirement fund's assets are invested almost totally in banks and government obligations (A-53 and 70).

a structure which is weighted heavily to exclude workers who don't or can't stay to retirement age is grossly exclusionary and forces many workers to labor long years for someone else's pension benefit. Responsibility to the fiscal integrity of the plan must be matached by a concern for an equitable eligibility structure which will provide benefits for workers on an equal basis consistent with a sufficient monthly benefit to justify the operation of the program.

The 90/10 rule is the primary reason that the defendant retirement fund sacrifices workers who become sick or who are laid off and must seek work outside the industry, or who for other reasons leave the industry between ages 50 and 60, in favor of increasing fund capital against contingent future liabilities which have been grossly overestimated.

The defendant retirement plan, as outlined throught Point III, is structurally weighted to exclude a significant number of workers who have a substantial tie to the industry without any rational basis. It thus violates the Taft-Hartley Act.

CONCLUSION

For all the reasons set forth above, this Court should reverse the decision of the district court and grant plaintiff judgment: (1) ordering defendants to establish new procedures for the determination of claims consonant with elemental requirement of fairness, and to re-determine plaintiff's claim for a disability pension by use of these new procedures; and (2) declaring that defendants' 90/10 rule is illegal and unenforceable in that it violates §302(c)(5) of the Taft-Hartley Act, 29 U.S.C. §186(c)(5); and enjoining defendants from requiring plaintiff to meet the requirements of said rule in order to qualify for a standard (retirement) pension.

Dated: New York, New York
June 26, 1975

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------x

JUAN SANCHEZ LUGO,

Plaintiff-Appellant,

-against-

THE EMPLOYEES RETIREMENT FUND OF THE ILLUMINATION PRODUCTS INDUSTRY, et al.,

Defendants-Appellees.

----------x

AFFIDAVIT OF PERSONAL SERVICE

~~Index No.~~

DOCKET NO. 75-7128

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

PEGGY KAMENS, being duly sworn, deposes and says:

Deponent is not a party to the within action, is over 18 years of age and resides at 509 W. 122 St., NYC 10027.

That on the 27th day of June 1975 deponent served the within Appellant's Brief & Joint Appendix upon Menagh, Trainor & Rothfeld, 130 E. 40th Street, N.Y.C., attorneys for appellees,

by delivering a true copy thereof to the receptionist at said address.

Deponent knew the person so served to be the person mentioned and described, because she identified ~~himself~~/herself to deponent.

Peggy Kamens
PEGGY KAMENS

Sworn to before me this
27th day of June ,1975.

David S. Preminger

DAVID S. PREMINGER
NOTARY PUBLIC, STATE of NEW YORK
No. 43-[illegible]
QUALIFIED in NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1977

1A

NOTICE OF ENTRY

Sir:- Please take notice that the within is a *(certified)* true copy of a
duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,

LEGAL SERVICES FOR THE ELDERLY POOR

Attorney for

Office and Post Office Address

2095 Broadway—Suite 304

Borough of Manhattan **New York, N. Y. 10023**

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19

at M.

Dated,

Yours, etc.,

LEGAL SERVICES FOR THE ELDERLY POOR

Attorney for

Office and Post Office Address

2095 Broadway—Suite 304

Borough of Manhattan **New York, N. Y. 10023**

To

Attorney(s) for

Index No. 75-7128 Year 19

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DAVID S. PREMINGER, ESQ.
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Borough of Manhattan **New York, N. Y. 10**

To

Attorney(s) for

Service of a copy of the within

is hereby admit

Dated,

Attorney(s) for